Supreme Court, U.S.
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No. 01-668

In The

Supreme Court of the United States

JEFF GREENE,

Petitioner,

vs.

IMAGINE ENTERTAINMENT;
HOWARD PRODUCTIONS, INC.; AND
GRAZER PRODUCTIONS, INC.,

Respondents.

On Petition For Writ Of Certiorari To The Second Appellate District For The State Of California

RESPONDENTS' BRIEF IN OPPOSITION

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of the United States Supreme Court:

1. Howard Productions, Inc. has no parent corporation and is not a publicly held company; and

2. Grazer Productions, Inc. has no parent corporation and is not a publicly held company.

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I.

INTRODUCTION

In recent years, the Court has amply charted the constitutional boundaries of punitive damages awards in state common law cases. There is no basis for granting certiorari in this California case involving a $104,816 compensatory damages award and $500,000 punitive damages award for real estate fraud.

On the basis of overwhelming evidence, the jury found that petitioner Jeff Greene, a real estate broker, committed fraud when he convinced Ron Howard and his family to rent Greene's secluded hillside house while the Howards were in Los Angeles to shoot a film. However, the house that Greene assured the Howards was "great" and in perfect working order turned out to be an ill-maintained, leaking behemoth. The only thing more astounding than the extent of the repeated flooding in the house, was the extent to which Greene lied about not knowing about the problem. It was only through sheer fortuity that the Howards discovered the proverbial "smoking gun" showing that Greene had known about the problem for years. The punitive damages award readily passes muster under all three established criteria – reprehensibility of the conduct, proportionality with the compensatory damages award, and consistency with punitive damages awards in other cases involving similar conduct.

Indeed, Greene's argument that the punitive damages award in this case is constitutionally impermissible rests on a faulty premise – that the relevant compensatory damages award is $2,034. But that is *not* the relevant compensatory damages number, as both the California

trial court and Court of Appeal ruled. Rather, the relevant compensatory damages figure is $104,816. Greene makes no argument that the punitive damages award is constitutionally infirm when measured against that compensatory award. Nor could he. Greene's *pro per* petition for a writ of certiorari is a last ditch effort to avoid the consequences of a scenario that he brought entirely upon himself. It is meritless and should be summarily denied.

II.

FACTS AND PROCEDURAL OVERVIEW

In its lengthy opinion, the California Court of Appeal thoroughly reviewed the salient facts and procedural history of this case. (The opinion is printed in the Appendix of Greene's petition at pages 31-61.) Respondents Imagine Entertainment, Howard Productions, Inc., and Grazer Productions, Inc. (collectively "Imagine") will not repeat that discussion in detail here. Greene's petition, however, is *laden* with misstatements about the facts and the procedural history. Imagine is compelled to respond to the most egregious of these.

In fact, the first ten pages of Greene's twenty-one page petition is an argumentative, incomplete diatribe that is not supported by a *single* citation to the record. The following is a choice example: Greene asserts that "trial was unfavorable to Mr. Greene from the start" because the trial court purportedly "allowed Imagine to present large blow-ups of pictures that undisputedly exaggerated the water infiltration conditions at the

house, hearsay testimony regarding alleged rodent infestation, hearsay testimony of an undisclosed expert concerning the condition of the property two years before the lease, and unqualified, non-expert testimony of alleged health and safety problems." (Pet. 5) *Each* of these assertions is incorrect.

The *evidence* established that the photos of the flooded house did *not* "exaggerate" the horrendous conditions. Rather, the photos showed flooding that *repeatedly* occurred due to Greene's refusal to fix the problem. (Cert. Pet. 45-46; RT 402-11, 525-26, 650-51, 654-55, 660, 723-24, 818-19, 1082-86) The evidence of the rat infestation (which was so bad the rodents chewed through the ignition wiring in the stove and ate anything that was left out, even a bowl of fruit on the kitchen table) was *not* hearsay. The Howards saw the mess and testified to it. (RT 1041-42, 1056-57)

Likewise, there was *no* testimony by an "undisclosed expert." On the contrary, there was testimony by a percipient witness who was retained by the prior tenant of the property, Diana Ross, to conduct an inspection to protect Ross from any unfounded claims by Greene. (Cert. Pet. 33 & n.3, 46; RT 733, 734, 946-56) As the Court of Appeal recounts in detail in its opinion, this witness discovered evidence of serious water leakage in nearly every room and prepared a lengthy report, which was sent to Greene. (Cert. Pet. 33 & n.3) Although this witness and report were directly relevant to Imagine's claim that Greene misrepresented the condition of the property, Greene "lied from day one" [RT 1842] and never disclosed the report or identified the witness. (Cert. Pet. 39

& n.10; RT 963-66; CT 289) Imagine fortuitously discovered the witness and his report on its own. (Cert. Pet. 39; RT 963-66; CT 289)

Finally, there was *no* "unqualified, non-expert testimony" of health and safety problems with the house. On the contrary, the Howards, themselves, experienced and testified to the health and safety problems, including the rat infestation [RT 1041-42], slipping and falling on wet floors [RT 342, 393-94, 1064], mildewed carpeting and furniture [RT 333, 1036-37, 1043, 1058-59], and rusted exposed electrical outlets [RT 1046-47].

Greene similarly asserts that Imagine never "pled" a fraudulent concealment claim that could support the punitive damages award. But, again, Greene is not candid with the Court. The *record* more than demonstrates that a claim for fraudulent concealment was properly sent to the jury. Imagine's fourth cause of action was broadly labeled "Fraudulent and Intentional Misrepresentation," and the allegations embraced claims of both affirmative misrepresentations and failure to disclose material facts. (CT 27) Substantial portions of discovery were directed to Imagine's claim of nondisclosure. (CT 287-88, 297-99, 343-45) Imagine retained and disclosed an expert to testify about Greene's duty to disclose. (CT 290; Tab Doc. 12, Exh. C[1]) Greene both deposed Imagine's expert [*id.*] and retained his own expert on the issue [RT 48-49]. Finally, Greene told Imagine just before trial that he was going to take the position that he "did not conceal any material

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[1] "Tab Doc." references are to the "Documents Accompanying Motion To Augment Record On Appeal" filed by the Court of Appeal on October 27, 1999.

condition that he had a duty to disclose" [Tab Doc. 12, Blum Dec. ¶ 7], and the joint pretrial statement therefore listed as the fifth disputed issue to be tried: "Whether plaintiff [Greene] failed to disclose the condition of the property" [*id.*; Tab Doc. 3 at 3]. Thus, Greene not only was fully aware that fraudulent concealment was an issue, he was fully prepared to address the issue at trial. Greene, however, mentions *none* of this in his petition.

The remainder of Greene's "Introduction" and "Statement of the Case" is replete with similar incomplete and incorrect statements about the facts and procedural history, including about the special verdict forms discussed in the next section of this opposing brief. Greene's lack of candor as to the state of the record, alone, is reason to deny his petition.

III.

THE PUNITIVE DAMAGES AWARD IS WELL WITHIN CONSTITUTIONAL BOUNDS

Greene's constitutional challenge to the amount of the punitive damages award rests entirely on the premise that the operative compensatory damages award is $2,034. However, Greene's essential premise is faulty, as the California trial court and Court of Appeal both ruled.

The jury returned a string of special verdicts. It found against Greene on his complaint for breach of contract (special verdict 1). It found in favor of Imagine on its cross-complaint as follows: Greene breached the rental contract ($3,282 damages awarded) (special verdict 1); Greene wrongfully withheld the $50,000 security deposit ($50,000 damages awarded) (special verdict 2); Greene

breached the implied warranty of habitability ($28,500 in damages awarded) (special verdict 3); the Howards were constructively evicted ($21,000 in damages awarded) (special verdict 4); Greene knowingly concealed a material fact(s) ($2,034 in damages awarded) (special verdict 6); and Greene knowingly made a material misrepresentation(s) (no damages awarded) (special verdict 7). (CT 76-93) The jury further found that Greene acted with oppression, fraud and/or malice as to the intentional concealment and deadlocked on oppression, fraud and/or malice as to intentional misrepresentation. (CT 88-93)

Given the nature of the claims, the evidence presented, and the parties' arguments, it was apparent to the trial court that the jury had awarded Imagine a total of $104,816 in compensatory damages, and to avoid duplication had distributed its award among the verdicts and awarded $2,034 in special verdict 6 because it was one of the last of the verdict forms. (RT 1751, 1754-55)

The trial court did *not*, however, instruct the jury that it was required to use $104,816 as its benchmark for determining the amount of punitive damages. Rather, it allowed the parties to argue their respective positions to the jury. (RT 1751-55) Imagine argued to the jury that it appeared it had awarded a total of $104,816 in compensatory damages and therefore could consider that amount in awarding punitive damages. (RT 1800-01) Greene argued the opposite and urged the jury to consider only the $2,034 it had inserted on the fraudulent concealment verdict form. (RT 1807-09)

Thus, the trial court left it *to the jury* to construe its *own* verdicts and did not, as Greene argues, make any

"unsupported assumption" as to what the jury intended. The jury agreed with Imagine and disagreed with Greene as to its compensatory damages award – which was entirely within its prerogative. Again, Greene recounts *none* of this in his petition.

Moreover, as the California Court of Appeal held, the trial court acted well within its discretion in construing the verdicts as apparently awarding total compensatory damages of $104,816 and allowing Imagine to argue that construction to the jury for it to agree or disagree. Imagine put on one damages case. (Cert. Pet. 55-57; RT 1657-58) Neither it nor Greene made any distinction as to the damages recoverable under the various causes of action. (*Id.*) Most importantly *all* the damages Imagine sought and the jury awarded were caused by and recoverable for Greene's fraudulent concealment. (Cert. Pet. 57) Thus, it was more than reasonable for the trial court to conclude that the progressively smaller amounts on the special verdicts reflected the jury's attempt to avoid duplicative awards. Indeed, it is the *only* reasonable conclusion in light of the seventh and last special verdict, in which the jury found Greene liable for fraudulent misrepresentation but put down "0" in the blank for damages. Imagine's claims for fraudulent concealment and intentional misrepresentation were different sides of the same coin, and the damages sought, proven and recoverable for both species of fraud were *identical*. (Cert. Pet. 55-57; RT 1657-58) Greene also recounts *none* of this in his petition.

The fundamental rule that a verdict "should be interpreted so as to uphold it and to give it the effect intended by the jury" is well established in California. (Cert. Pet.

56-57) Moreover, there is clear California precedent involving very similar circumstances – *All-West Design, Inc. v. Boozer*, 183 Cal. App. 3d 1212, 1223 (1986).[2] *See generally* 7 Witkin *California Procedure*, Trial § 354, at 402-04 (4th ed. 1997); *cf.*, *Walker v. Signal Companies, Inc.*, 84 Cal. App. 3d 982, 995-96 (1978) (appellate court reduced fraud damages to eliminate duplication with contract damages and then considered the total fraud/contract compensatory damages award in reviewing and upholding the punitive damages award). (Cert. Pet. 56-57)

At the end of his petition Greene invites this Court to resolve a supposed "discrepancy" in California law involving the application of *All-West*. (Pet. 20) To begin with, it is not the province of this Court to resolve issues

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[2] In *All-West*, as here, the plaintiff was fraudulently induced to enter a contract, the special verdict forms for fraud were last in a series of special verdict forms, and the jury listed only minimal damages on the fraud forms ($1,625 for fraudulent concealment and "no further damages" for promissory fraud). 183 Cal. App. 3d at 1217-22. In light of the claims that were at issue and the evidence that was presented, the California Court of Appeal held that, in awarding punitive damages, the jury properly could consider all the compensatory damages awarded, including those awarded in the special verdict for breach of contract ($9,350). *Id.* All of the damages awarded were recoverable for fraud, and it was apparent that the jury had put a low figure on the fraud special verdict forms to avoid giving the plaintiff a double recovery. *Id.* at 1223. That is exactly what was apparent to the trial court and the Court of Appeal here. Thus, contrary to what Greene asserts [Pet. 20] neither *All-West*, nor the trial court and Court of Appeal in this case, embraced the notion that contract and tort damages can be "aggregated" for punitive damages purposes.

of state law. Furthermore, Greene supplies no argument as to the source and substance of this supposed discrepancy in California law. In fact, there is none.

Thus, contrary to the essential premise on which Greene's petition rests, the operative compensatory damages award in this case is $104,816, *not* $2,034. Greene makes *no* argument that the $500,000 punitive damages award is constitutionally infirm when considered in the context of the actual $104,816 compensatory damages award. Nor could he. The punitive damages award is well within the acceptable range considering the degree of reprehensibility of Greene's conduct, the ratio of punitive to compensatory damages, and sanctions imposed in other similar cases. *BMW of North America v. Gore*, 517 U.S. 559, 574-85 (1996) (*Gore*).

Greene contends that the fraud he committed was not particularly egregious. But this is a jury argument that he was unable to sell to the jury, the trial court or the Court of Appeal. Moreover, as the Court of Appeal's opinion reflects, Greene's conduct, from beginning to end, was outrageous. He *repeatedly* lied to the Howards and their business and real estate representatives, and even at trial exhibited absolutely no contrition. (Cert. Pet. 32-39 & n.10) As this Court stated in *Gore*, "[p]erhaps the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." *Id.* at 575.

Nor is the ratio of punitive to compensatory damages – less than 5 to 1 – beyond the pale, particularly given Greene's egregious conduct, his utter lack of remorse and

his net worth. While Greene attempts to portray himself as a hapless "individual" who has been hit with a "large" individual punitive damages award, that also is not faithful to the record. Greene owns and manages a real estate empire and at the time of trial had a net worth of $9.9 million. (Cert. Pet. 40; RT 1779) Thus, for all intents and purposes, Greene is a business. The less than 5 to 1 ratio is *well* within the acceptable ballpark. (Cert. Pet. 57-58) *See, e.g., Neibel v. Trans World Assurance Co.*, 108 F.3d 1123, 1132 (9th Cir. 1997) (6 to 1 ratio "does not 'raise [our] suspicious judicial eyebrow' "); *Federal Deposit Insurance Corp. v. Hamilton*, 122 F.3d 854, 862 (10th Cir. 1997) (remitting punitive damages to a 6 to 1 ratio); *Parsons v. First Investors Corp.*, 122 F.3d 525, 530-31 (8th Cir. 1997) (affirming remitted punitive damages award having 11 to 1 ratio).

As to the final consideration, comparable sanctions, the Tenth Circuit recently observed, "[a] finding of common law fraud does not lend itself to comparison with statutory penalties." *United Phosphorus, Ltd. v. Midland Fumigant, Inc.*, 205 F.3d 1219, 1231 (10th Cir. 2000). What does provide a ready comparison are California fraud cases in which punitive damages have been awarded. Those cases provide ample "notice" that fraudulent conduct can result in more than *de minimis* punitive damages where a plaintiff meets the heightened burden imposed by California law and shows by clear and convincing evidence that the defendant acted with malice, fraud or oppression. Cal. Civ. Code § 3294; *e.g., Notrica v. State Comp. Ins. Fund*, 70 Cal. App. 4th 911, 950 (1999) (fraud insurer perpetrated on insured supported punitive damages of $5 million; compensatory damages of $480,000); *Douglas v. Ostermeir*, 1 Cal. App. 4th 729, 750-51 (1991)

(fraud in single used auto sale supported punitive damages of $187,000); *Ballou v. Master Properties No. 6*, 189 Cal. App. 3d 65, 74-75 (1987) (fraud that deprived real estate broker of commission supported $2 million in punitive damages; $138,000 in compensatory damages).

Greene argues that the California Penal Code provides merely a $10,000 fine for "fraud." (Pet. 18) Even if penal statutes provided a ready comparison in this case, which they do not [*United Phosphorus, Ltd.*, 205 F.3d at 1231], Greene does not begin to provide a complete picture of the penalty California extracts for the crime of grand larceny. Specifically, the fraudulent obtaining of "money" is a crime under California law, punishable as larceny. Cal. Pen. Code §§ 484, 532. Larceny, and specifically grand theft (*i.e.*, stealing more than $400), is punishable by all or a combination of the following: up to one year in state prison [*id.* § 489], a $10,000 fine [*id.* § 672] and restitution [*id.* § 679.02(a)(9)]. In addition, California's Penal Code recognizes crime victims' right to pursue "civil recovery" and to be compensated from a state restitution fund. *Id.* § 679.02(a)(8). Thus, the criminal punishment California extracts for "fraudulent" conduct can be significant, justifying on the civil side a significant punitive damages award. *See Neibel*, 108 F.3d at 1132 (canvassing some of same California penal statutes and noting "severe criminal penalities" potentially existed); *Grabinski v. Blue Springs Ford Sales, Inc.*, 203 F.3d 1024, 1026 (8th Cir. 2000) (noting combination of penalties and incarceration, which imposed "significant" criminal sanctions).

In sum, weighing all three of the factors identified in *Gore* leads inexorably to the conclusion that the relatively

modest punitive damages award imposed by the jury in this case is not even close to being a "grossly excessive" and constitutionally impermissible "punishment."

IV.

CONCLUSION

This case is one more variation of the countless common law fraud cases that are already on the books. While Greene remains in denial and cannot fathom how he could be liable for a relatively modest compensatory and punitive damages award, the record tells the tale. His deceit was not lost on the Howards, or the people who worked for them, or the jury, the trial court and the Court of Appeal. No "constitutional" issue exists in this case, let alone one that merits the attention of this Court, and Greene's petition should be denied.

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